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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 934

HELEN D. MILLER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on February 6, 1962. This judgment affirmed the decision of the Tax Court of the United States entered March 7, 1961.

Opinions Below

The opinion of the Tax Court is printed in the Court of Appeals Appendix (copies of which are attached hereto) and is reported at 35 T. C. 631. The opinion of the Court of Appeals is printed in Appendix B hereto and is reported at 299 F. 2d 706.

Jurisdiction

The judgment of the Court of Appeals was entered on February 6, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Question Presented

May an intangible interest be characterized as not being "property" for the purpose of the capital gains tax, for the sole reason that it had not yet acquired a precise "property" label under local law, despite the intent of the parties to deal with the interest as property in the course of an arm's length purchase and sale?

Statute Involved

This case involves the interpretation of the capital asset definitional provisions—Section 1221 of the Internal Revenue Code of 1954 (26 U.S.C. Sec. 1221). This statute is set forth in Appendix A.

Statement

Petitioner is the widow of the late Glenn Miller. At issue in this proceeding is the proper income tax treatment of the amount of $409,336.34 which petitioner received in 1954 pursuant to the terms of an agreement with Universal Pictures Company, Inc., dated July 24, 1952 (which gave rise to the production and release of the motion picture, "The Glenn Miller Story"). Under this contract petitioner granted to Universal, in return for receipt of specified percentages of the gross proceeds of all photoplays, the exclusive, world-wide right in perpetuity to produce, distribute and exhibit photoplays based upon the life and career of Glenn Miller.

Petitioner contended in the courts below that the grant of such right constituted the sale of a "capital asset" as that term is defined in Section 1221 of the Internal Revenue Code.* Both lower courts determined that petitioner's proceeds from the motion picture contract were ordinary income and not capital gain, differing however in the grounds for decision. The Tax Court negated the existence of any property right in petitioner, adopting respondent's argument that petitioner was paid for the release of her right of privacy and for her personal services. Without deciding that these findings were erroneous, the Court of Appeals apparently accepted petitioner's premise that she had actually sold "something", but the court concluded that this "thing" had not acquired a sufficiently clear judicial definition to be recognized as "property" for capital gains taxation.**

Reason for Granting the Writ

The opinion below presents in a manner ripe for resolution a fundamental question of income tax policy never before passed upon by this Court. To what extent must a common law property right be refined by local law before a tax court (i.e., any court sitting in an income tax case) may treat such right as "property" for purposes of the capital asset definition? The Court of Appeals has held that a tax court must deny "property" status to an interest which for business reasons (having nothing to do with taxation) has been bargained for as a property right, simply because at the time of the bargain the precise right had not yet been literally labeled as "property" under local law.

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* To meet this statutory definition requires a showing (1) of a disposition of "property held by the taxpayer" and (2) that such "property" does not fall within one of five proscribed classes.

** Neither of the courts below questioned the satisfaction of the "sale or exchange" requirement, nor suggested that any of the exclusionary provisions of § 1221 were applicable.

In disregarding the parties' intention to achieve property consequences for non-tax reasons, the court failed to differentiate this type of transaction from a collusive device intended merely to produce capital gain. The implication of this decision is that a tax court need make no independent inquiry into the substance and attributes of the property right. Here, for example, no determination was made whether the right involved was sufficiently analogous to well recognized property rights to qualify for capital asset treatment. Nor was any determination made that the right came within the letter or spirit of one of the statutory exclusions.

If permitted to stand, this novel but reactionary interpretation of an important statute will produce considerable confusion in the administration of the tax law. Moreover, it can be expected to stultify the development of the tax law in meeting evolving judicial concepts while those concepts are crystallizing into readily identifiable patterns in the "common law" courts. This may well be a landmark decision, but it is surely a sightless beacon for those who take pride in the flexibility and adaptability of our judicial system.

On several occasions during the past decade this Court has sought to develop and give content to the statutory definition of a capital asset. One may clearly perceive from these decisions that the Court has been moving towards a restricted definition of "property" for capital asset purposes.* The refusal to give literal effect to this definition has resulted from an understandable reluctance

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* This direction has been taken notwithstanding the criticism that turning "'property' from an all-inclusive term into an elastic concept" is hardly a solution to the problem. Surrey, *Definitional Problems in Capital Gains Taxation*, 69 HARV. L. REV. 985, 996. For present purposes petitioner takes no side in this controversy, but it is interesting to note that the Court of Appeals inappropriately quoted the Surrey article in support of its position in this case (see n. 9).

to allow preferential treatment for transactions which violate the *spirit* of the statutory exclusions—an unwillingness to presume that Congress intended favorable tax consequences to attach to transactions which are not capital in nature.

Thus, this Court has excluded profits arising from the everyday operation of a business (*Corn Products Refining Co.* v. *Commissioner*, 350 U. S. 46 (1955)), from the present realization of future income (*Commissioner* v. *Lake, Inc.*, 356 U. S. 260 (1958)), and from the conversion of a mere incident of property (*Commissioner* v. *Gillette Motor Transport, Inc.*, 364 U. S. 130 (1960)). The lines of delineation are now clear enough to bar all artificial devices designed to transmute ordinary income into capital gain. (See Slitor, *Problems of Definition under the Capital Gains Tax*, 10 NAT'L TAX J. 26, 30-31;* Katcher, *Elements of Capital Gain—What Is a Capital Asset*, 12 W. RES. L. REV. 256, 265.)

While demonstrating its familiarity with this history, the Court of Appeals has unfortunately misinterpreted the lesson of this history. It has uncritically adopted the theme of narrow definition, wrenching it from the context of the decisions in which it was applied. It has taken an *approach* as a *mandate*, a discretionary policy as an inexorable rule. While this Court used the definition of "property" to exclude a merely technical compliance with the statute, the Court of Appeals has now excluded substantial compliance by a technical application of the definition. In contrast to this Court's efforts to make the capital gain statute a realistic and workable definition in the context of its tax objective, the Court of Appeals has found, "The case before us only involves the meaning of language in a highly technical statute and the legal effects flowing from that language."

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*It is interesting to note that none of the six classes of non-capital transactions enumerated by the author remotely resembles the instant transaction.

The heart of the lower court's opinion is contained in two paragraphs commencing on page 20 of Appendix B. The court finds that what Universal Pictures bought from petitioner was "the chance that a new theory of 'property' might be advanced, and that a lawsuit predicated on it might be successful"—"a hedge against the chance that the Miller 'property' *might* exist." The court concedes that Universal's payment was not foolish or illusory, that it "got what it contracted for in 1952." But it nevertheless concludes that Universal did not pay for "property".

The logical extension of this doctrine is made by the court itself in the succeeding paragraph. This indicates that if petitioner had sued Universal for making the motion picture without her consent, and such suit had been brought solely on the theory of misappropriation of property, a payment by Universal in settlement could not partake of the nature of the claim and therefore would not give rise to capital gain:

> "[T]he Commissioner, for purposes of taxation, may accept that settlement as an implied affirmation that the *facts* were substantially as the plaintiff contended, and treat the recovery accordingly. But no two individuals can, by agreement between themselves, create a *legal* principle, binding upon everyone else, including the Commissioner, where none existed before."

The statement that the parties were *creating* a legal principle might suggest that the court was dealing with a collusive and artificial attempt to achieve capital gain. To the contrary, it is clear that both courts below recognized that the parties were trying only to define their legal rights and obligations in a relatively untested relationship, but on the basis of fundamental legal principles which they believed to be controlling.

The only consequences which were important at the time and which Universal bargained to achieve related to busi-

ness necessity. Without an undertaking by petitioner, supported by a warranty and backed up by an indemnity, to convey an exclusive right to make the motion picture, Universal would not have embarked upon such a venture. Unless petitioner—by virtue of her control over the exploitation of Glenn Miller good will—could *insure* Universal of *exclusivity* the studio could not afford to risk its huge investment in the production. It was her power to transfer an exclusive which made the right so valuable (*Haelan Laboratories* v. *Topps Chewing Gum*, 202 F. 2d 866, 868 (2nd Cir.), cert. den. 346 U. S. 816 (1953)). Petitioner did not "create" a property right. It was the attributes of the right she transferred, particularly exclusivity, which identified it as property (see Restatement, Property §§ 1-5, § 5, comment (e) (1936)).

The Court of Appeals has charged petitioner and Universal with creating a property right "where none existed before". But how are common law property rights created? Does a property right come into existence only when and only because a court affixes the label "property"? Is its nature a moment before the decision different in substance from a moment after? In its literal approach to this case the Court of Appeals has acted as if businessmen treat an item as property only because some court has said they must, forgetting that judicial formulation of a property right is often no more than recognition of established business practice.*

The Court of Appeals minimized the role of lawyers, acting in a business contest, in fostering the development of common law property rights. "[A] lawyer's prediction of the future, as some lawyers know, is not law." This

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* It is clear, for example, that the *Haelan* case, *supra*, was decided the way it was because of the existence of the "now [1954] pervasive trade practice of paying well known personalities considerable sums for the right thus to use [their] publicity values." (Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROB. 203.)

failure to appreciate the impact of the predictive function in large measure contributed to the artificial result reached by the court. Once the motion picture industry started to buy the publicity rights of living or deceased celebrities in anticipation of their judicial recognition,* such rights for all practical purposes—including taxation—were property. The line of separation had been crossed, without the need for a "case in point".**

The labeling of a particular right as property under state law has never had a magical significance in the tax law (*Watson* v. *Commissioner*, 345 U. S. 544 (1953); see also *Commissioner* v. *Lake, Inc., supra*). Such a label would not deter a tax court from examining the substantive basis of the right involved to determine whether it came within the statutory definition. If the existence of a label is not controlling, conversely, its absence is not fatal to capital asset treatment. The implication of the opinion below, however, is that a tax court is foreclosed from inquiring into the substantive basis of the right.***

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* It is clear that Universal was not the first studio to engage in such a purchase (see Mintz, *Entertainers and the Capital Gains Tax*, 4 TAX L. REV. 275, 303, n. 154 [the year of the cited article should be 1947, not 1941]).

** Nevertheless, the anticipation of judicial trends by Universal and others was sound, as attested to by *Shaw* v. *United Artists*, Docket No. 54, C. 290 (N. D. Ill. 1955) [unreported], establishing that the heirs of a deceased celebrity can sue for appropriation of the property rights in the celebrity's "name, picture and history" in connection with his portrayal in a motion picture (discussed at length in Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NORTHWESTERN L. REV. 553, 600). The *Shaw* case was ignored by the Court of Appeals, which cited only *Runyon* v. *United States*, 281 F. 2d 590 (5th Cir. 1960). In *Runyon*, on the basis of the arguments advanced to it, the court properly held that the right of privacy is not a property right. We cannot speculate how the court would have treated petitioner's theory.

*** As illustrative of the lower court's fascination with labels, footnote 4 distinguishes *Uproar Co.* v. *National Broadcasting Co.*, 8 F. Supp. 358 (D. Mass. 1934), aff'd 81 F. 2d 373 (1st Cir.)

(Footnote continued on following page)

A uniform application of the tax law would seem to require at the very least that transactions of like kind produce like tax results. The restrictive doctrine propounded by the Court of Appeals contravenes this policy of uniformity. If a tax court may avoid responsible analysis of the substance of a common law right by expedient reliance on the absence of a "case in point", then a variety of transactions capital in nature will be subjected to treatment radically different from analogous but older property concepts.

If the right asserted to be "property" in this case were removed from other rights treated as property for tax purposes, the skepticism of the Court of Appeals might be warranted. The court expressed doubt whether the right of publicity* was a property right, reading unintended meaning into *Haelan's* avoidance of the label "property."** It also questioned whether the case of *Thomas D. Armour*, 22 T. C. 181 (1954) (upon which petitioner heavily relied), recognized the right of publicity as property for tax purposes (see n. 10). Not only did the Commissioner in *Armour* treat the right to use a celebrity's name

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(Footnote continued from preceding page)

cert. den. 298 U. S. 670 (1936), as arising in an "unfair competition" context. But a trade name is none the less property because it is protected by means of an action for unfair competition (see, e.g., *Lincoln Restaurant Corp.* v. *Wolfies Rest. Inc.*, 291 F. 2d 302 (2nd Cir.), cert. den. 368 U. S. 889 (1961); *Hogan* v. *A. S. Barnes & Co., Inc.*, 114 U.S.P.Q. 314 320 (Pa. Com. Pleas). The Nimmer article, *supra*, cites many instances of the substance of the right of publicity receiving protection under other labels.

* The exclusive right transferred by petitioner is so closely analogous, if not identical, to the right of publicity so as to leave little doubt that the two should give rise to the same tax consequences.

** It is clear from a study of the appeal briefs and the District Court opinion (103 F. Supp. 944) which was reversed on appeal, that the entire result turned upon whether the right to use a celebrity's name and likeness was a *personal* right, not susceptible of exclusive assignment. The negation of this theory necessarily involved a determination that such right had the *attributes of property*.

as property held by him, but he equated such property with *trade name* rights (termed by the Commissioner in the instant case as "indisputably a capital asset of a recognized kind"—Resp. Br., p. 30).* In view of the position taken in *Armour* it is understandable that the Commissioner here refrained from discussing or even citing the case.

The juxtaposition in *Armour* of the right of publicity and trade name rights is supported by sound authority. As a striking parallel, one of the cases principally relied upon by the Court of Appeals in *Haelan, supra*, was *Madison Square Garden Corp.* v. *Universal Pictures Co.*, 255 App. Div. 459, a trade name case. Investing a celebrity's name with the status of a trade name or mark does not change the underlying substance of the right involved. The name is equally property in the hands of the licensor-celebrity, even though it has not been associated with any vendible commodity. The Court of Appeals in this case seems to have succumbed to the very theories which it flatly disapproved in the *Haelan* case.**

In *Rose Marie Reid*, 26 T. C. 1022, and *Huckins* v. *United States* (not officially reported, 60-1 USTC ¶9394) (S. D. Fla. 1960), respondent opposed capital gain treatment on the ground that there was a dispute or question as to the taxpayer's title to the alleged property right. In both of these cases respondent's objections were overruled since the court was satisfied that, regardless of perfection of title, the payments received by the taxpayer were received *in respect of* a transfer of property rights. In his brief to

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* As an aid to the Court in clarifying the *Armour* decision, counsel has obtained and attached hereto a certified copy of the Government's brief in *Armour* (see pp. 16, 21, 22, 25, 26).

** "Fame is not merchandise. It would help neither sportsmanship nor business to uphold the sale of a famous name to the highest bidder as property. * * * It is the trade rather than the names and likenesses which the law will protect as property." *Hanna Mfg Co.* v. *Hillerich & Bradsby Co.*, 78 F. 2d 763, 766-7 (5th Cir. 1935), disapproved in *Haelan*.

the Court of Appeals (pp. 30-31), respondent distinguished these cases thusly:

> "In each of these cases there was a contract for the sale by the taxpayer of what was indisputably a capital asset of a recognized kind—patents, trade names, a secret process—but there was some question as to whether the taxpayer had not previously divested himself of all rights in the asset. *In such a situation it is reasonable to treat the proceeds of the purported sale, referrable solely to the transfer of the asserted asset, as in fact consideration for the sale of that asset: the money has unquestionably been received and it could have been received in respect of nothing but the admitted asset involved. Otherwise, the proceeds are inexplicable.* In the present case, by contrast, if petitioner had no right in the 'package,' the payments to her by Universal do not thereby become inexplicable. *There is another aspect of her dealings with Universal to which they more obviously refer.* What the consideration for the payments was, the terms of the contract clearly reveal: services, materials, releases of liability for potential invasion of her own and her children's rights of privacy, undertakings to secure consents from others. These, the Tax Court found as a fact, were what the petitioner sold." (Emphasis supplied)

The distinction thus urged by the respondent would have left this case merely another "factual" decision in the borderland between "property" rights and "income" rights. The Court of Appeals, however, has clearly rejected that distinction, and has set up a new barrier based upon an alarming misconception of the judicial process. The court has in effect said, "This would be a 'property' right if the courts had clearly said so before the parties acted on the assumption that the right existed. But, at least for tax purposes, we must close our eyes to the

realities as seen by the parties, because those 'realities' may turn out to be illusions when the courts finally examine them"? The common law courts have not actually been as oblivious to the business-developed concepts in this area as the opinion below would indicate. More important, however, no tax tribunal should hold, either for or against a taxpayer, that the scope of a tax statute is limited to definitions developed in completely litigated issues. At its most potent, a litigated case *helps* to shape the rights and obligations of businessmen; it does not *create* those rights in a business vacuum.

CONCLUSION

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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May 3, 1962

APPENDIX A

Statute Involved

Internal Revenue Code of 1954:

26 U. S. C. Sec. 1221:

"SEC. 1221. For purposes of this subtitle, the term 'capital asset' means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

(1) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

(2) property, used in his trade or business, of a character which is subject to the allowance for depreciation provided in section 167, or real property used in his trade or business;

(3) a copyright, a literary, musical, or artistic composition, or similar property, held by—

(A) a taxpayer whose personal efforts created such property, or

(B) a taxpayer in whose hands the basis of such property is determined, for the purpose of determining gain from a sale or exchange, in whole or in part by reference to the basis of such property in the hands of the person whose personal efforts created such property;

(4) accounts or notes receivable acquired in the ordinary course of trade or business for services rendered or from the sale of property described in paragraph (1); or

(5) an obligation of the United States or any of its possessions, or of a State or Territory, or any political subdivision thereof, or of the District of Columbia, issued on or after March 1, 1941, on a discount basis and payable without interest at a fixed maturity date not exceeding one year from the date of issue."

APPENDIX B

The following is the full context of the opinion of the United States Court of Appeals for the Second Circuit in the instant case:

Opinion

KAUFMAN, *Circuit Judge:*

Petitioner is the widow of Glenn Miller, a band leader who achieved world fame about twenty-five years ago. Although Glenn Miller died in 1944, petitioner has been able to engage in a number of enterprises actively exploiting his continuing popularity. Apparently "the good that men do," if sufficiently publicized, does live after them, for petitioner's commercial efforts have met with appreciable financial success.

Thus, in 1952, she entered into a contract with Universal Pictures Company, Inc. (Universal) in connection with the production of a motion picture film entitled "The Glenn Miller Story"; and in the calendar year 1954, she received $409,336.34 as her share of the income derived from that theatrical venture. According to the terms of the 1952 contract, petitioner had purportedly granted to Universal "the exclusive right to produce, release, distribute and exhibit * * * one or more photoplays based upon the life and activities of Glenn Miller throughout the world"; and had warranted that she was "the sole and exclusive owner of all the rights" conveyed by her.

Petitioner now contends that the payment received in 1954 from Universal pursuant to that contract should be considered, for income tax purposes, as a "gain from the sale or exchange of a capital asset held for more than 6 months * * *" 26 U. S. C. § 1222; while the Commissioner, whose position was sustained by the Tax Court, contends

that the 1954 payment must be treated as ordinary income.[1] That is the difference between the parties, and in terms of taxes allegedly due in this case, it amounts to $159,850.71. Since there is little doubt on the facts presented here that there was a "gain," a "sale or exchange," and a holding "for more than 6 months," the specific question dividing the parties relates to the meaning of the term "capital asset." Furthermore, since Section 1221 of the Internal Revenue Code of 1954, 26 U. S. C. § 1221, defines the term "capital asset" as "*property* held by the taxpayer * * *" (emphasis supplied), and since, if anything was held by anyone it was held by the petitioner,[2] the conflict is narrowed to the meaning of the word "property" for purposes of this section of the Code.

One would assume that since the question is so easily narrowed, the answer would be correspondingly free of difficulty. The assumption is unwarranted. The narrowing of a question does, ordinarily, reduce the *complexity* of the answer; but it also tends to increase the difficulty of reaching it. Moreover, in order to avoid creating more

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[1] The Tax Court concluded that, (a) petitioner was compensated by Universal for services which she had agreed to render in connection with the photoplay; (b) petitioner accepted a share in the proceeds of the motion picture as an advance settlement of any liability which Universal might incur because of an invasion of privacy; and (c) petitioner had no "property right" in the name, image, reputation etc. of Glenn Miller which could qualify as a capital asset. Although the Tax Court's discussion of issues (a) and (b) suggests that there are alternative theories upon which this Court might affirm its decision, we prefer to dispose of the matter by accepting, *arguendo*, petitioner's theory that the contract dealt with a conveyance of "property" only. For this purpose we ignore the fact that taxpayer's original petition characterized the contract proceeds as constituting both a payment for taxpayer's services and a settlement of tort liability.

[2] It is clear that whatever was sold to Universal was either created by petitioner, or owned by her deceased husband during his life. In addition, there is no dispute that under his will petitioner was the decedent's sole beneficiary.

problems than we resolve, we wish to emphasize that throughout the ensuing discussion, our analysis of the term "property" is made within the context of capital gains taxation; universality in definition is not only unlikely, but undesirable.

The Internal Revenue Code does not define "property" as used in Section 1221.[1] "It is here that the Code itself discloses the enormity of the problem." Surrey, *Definitional Problems in Capital Gains Taxation*, 69 Harv. L. Rev. 985, 988 (1956). This is one of those instances in which the drafters of that statute have (for obvious reasons) declined the challenge of preserving a chameleon in a pithy phrase. See 3B Mertens, *Federal Income Taxation*, § 22.12 (1958). Therefore, we must look outside the eight corners of the code for some elucidation. The ordinary technique is to refer to principles of state property law for, if not an answer, at least a hint. Since ultimately it is the Congressional purpose which controls, such non-tax definitions are certainly not binding on us. See *Ernest A. Watson*, 45 T. C. 800, 813 (1950), aff'd. on other grounds: 197 F. 2d 56 (9th Cir. 1952), aff'd 345 U. S. 544 (1953); cf. *Burnet* v. *Harmel*, 287 U. S. 103, 110 (1932). On the other hand, Congress may be presumed to have had ordinary property concepts in mind so they are relevant to our inquiry.

Most people trained in the law would agree that for many purposes one may define "property" as a bundle of rights, protected from interference by legal sanctions. Cf. Restatement, Property, §§ 1-5. This concept is behind one prong of petitioner's attack. She cites several cases,[2]

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[2] *Ettore* v. *Philco Television Broadcasting Corp.*, 229 F. 2d 481 (3rd Cir.), cert. denied 351 U. S. 926 (1956); *Haelan Laboratories, Inc.* v. *Topps Chewing Gum, Inc.*, 202 F. 2d 866 (2nd Cir.), cert. denied 346 U. S. 816 (1953); *Uproar Co.* v. *National Broadcasting Co.*, 8 F. Supp. 358 (D. Mass. 1934), aff'd. 81 F. 2d 373 (C. C. A. 1), cert. denied 298 U. S. 670 (1936).

claiming they indicate that if Universal had made its motion picture without contracting with her, it would have been the victim of a substantial lawsuit.

Even if this were so, those cases would not compel this court to recognize, for income tax purposes, a "property right" in Glenn Miller himself if he were still alive. However, it is not necessary for us to reach a determination upon such an assertion. Those cases do not even remotely bear on the question whether such a property right,[4] if it existed, could pass to the sole beneficiary under his will; and certainly they lend no support to petitioner's theory that the reputation or fame of a dead person could give rise to such "property rights."[5] In fact, in the only case

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[4] The *Ettore* and *Haelan Laboratories* cases, both decided after the petitioner contracted with Universal, involved "rights" of living persons. *Ettore*, which concerned the exclusive "right" to publication of one's own performance, is wholly inapposite, since petitioner does not purport to grant rights to a performance of Glenn Miller. *Haelan Laboratories*, which held that a living celebrity has a "right of publicity" in the use of his own photograph, under New York Law, carefully avoided terming it a "property right," no doubt in order to avoid unintended consequences which might follow from such classification. *Uproar*, apparently an application of pre-Erie "federal contract law," held that a living person's grant of the use of his name created "rights of a pecuniary nature * * * which partake of the *elements* of property rights." (Italics added.) 8 F. Supp. 361. Aside from its questionable authority as the law of any state, and the "unfair competition" context in which the issue arose, this case has little application because of the scope of the rights asserted to exist in the present instance.

[5] There is apparently a right under continental law, which is similar to the "property right" asserted by petitioner, the so-called "moral right." See e.g., Strauss, *The Moral Right of the Author*, 4 Am. J. Comp. 506 (1955). This seems to encompass the right to prevent the "distortion, mutilation or other alteration" of an author's work. See art. 6 *bis*, section (1) of the Brussels Convention (1948); Strauss, *op. cit. supra* at p. 509; and that right may pass to the heirs of the author in certain circumstances. See art. 6 *bis*, section (2) of the Brussels Convention (1948). Whether it would permit the heirs of Glenn Miller to protect "The Glenn Miller Story" is unclear. But, in any event, the moral right, as such, is not recognized in this country.

cited in which the rights of a dead man were considered at all, the court held against the claimant. *Ruffin, Jr. v. U. S.*, 281 F. 2d 590, 592 (5th Cir. 1960). Indeed, petitioner is well aware of this, for she concedes that at the time of the "sale" there were "no *clear-cut* decisions • • • protecting publicity rights of a deceased celebrity • • •" (Pet. Br., p. 43).

Undeterred by her failure to find case authority which would substantiate the existence of "property rights" petitioner invokes the authority of logic. With considerable ingenuity, she argues:

(1) Universal paid petitioner $409,336.34 in 1954, which is a great deal of money.[6]

(2) Universal was a sophisticated corporate being to which donative intent would be difficult to ascribe.

(3) If there was no danger in free use of Glenn Miller material,[7] why did Universal pay?

Petitioner appears to find this question unanswerable unless it is conceded that there was a sale of a "property right." Petitioner is wrong.

It is clear to this Court, at least, that many things can be sold which are not "property" in any sense of the word. One can sell his time and experience, for instance, or, if one is dishonest, one can sell his vote; but we would suppose that no one would seriously contend that the subject matter of such sales is "property" as that word is ordinarily understood. Certainly no one would contend that

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[6] It should be noted that petitioner received a fixed percentage of the income produced by the motion picture. Only the ultimate success of the venture, the extent of which was unknown at the time of the signing of the contract, made the sum actually paid so high.

[7] Petitioner characterizes the subject matter of the sale variously as Glenn Miller's "story" (Pet. Br. p. 27), as "good will" (Pet. Br. pp. 27, 37), and as a "right of publicity" (Pet. Br. p. 32).

such subject matter was inheritable. We conclude, therefore, that not everything people pay for is "property."

In the instant case, "something" was indeed sold. And the expedient business practice may often be to sell such "things." But the "thing" bought, or more appropriately "bought off," seems to have been the chance that a new theory of "property" might be advanced, and that a lawsuit predicated on it might be successful. It was a purchase, so to speak, of freedom from fear. In effect, it was a hedge against the chance that the Miller "property" *might* exist. Because Universal feared that it might sometime in the future be held to have infringed a property right does not mean, however, that a court presently considering whether that property right *did* exist in 1952 must realize Universal's worst fears. That does not mean that Universal's payment was foolish or illusory. It got what it contracted for in 1952 and what it later paid Mrs. Miller for: freedom from the danger that at a future date a defensible right constituting "property" *would* be found to exist. But it didn't pay for "property."[8]

It may be helpful to compare this situation with one which involves the settlement of a tort claim, eg. a negligence lawsuit. No one doubts the existence of a legal principle creating liability for negligence. If the facts are as a plaintiff contends, and they come within that principle, the defendant's liability exists. Even if they do not, the defendant, for his own reasons, may agree to make a payment in settlement of his alleged liability. Moreover, the Commissioner, for purposes of taxation, may accept that settlement as an implied affirmation that the *facts* were

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[8] One must remember that, the techniques of advertising and promotion being what they are, timing is very important and a successful motion for a preliminary injunction made by one who *claims* a "property right" might be as disastrous as a final award of damages. One can easily find wisdom in this payment by Universal without finding that it paid for "property."

substantially as the plaintiff contended, and treat the recovery accordingly. But no two individuals can, by agreement between themselves, create a *legal* principle, binding upon everyone else, including the Commissioner, where none existed before. This is the exclusive domain of the legislature and the courts as repository of the public will. Admittedly, this court cannot overlook the fact that much of the work of a lawyer is predicting future judicial advances (or aberrations, perhaps); and that is undoubtedly what Universal's lawyers were doing in 1952. But, a lawyer's prediction of the future, as some lawyers know, is not law.

In any event, we are unwilling to accept the fact of substantial payment as proof that "property" within the meaning of Section 1221 of the Code exists; and for the reasons stated, we must reject this argument as being in reality a makeweight.[9] Petitioner concedes that at the time of the "sale" there had been no authoritative decision holding that a decedent's successors had any "property right" to the public image of a deceased entertainer; and therefore it follows that their bargain was not, at that time a bargain that both parties knew involved a "property right." Furthermore, we do not find it necessary to decide whether the parties were then bargaining for a property right. The case before us only involves the meaning of language in a highly technical statute and the legal effects flowing from that language.

"[I]t is evident that not everything which can be called property in the ordinary sense and which is outside the

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[9] "Since in one sense everything that the taxpayer holds is 'property' * * * it would seem to follow that all income could well be 'capital gain'—for any moneys received by a taxpayer could readily be regarded as the result of the surrender by him of 'property' in the form of either tangible assets or intangible property such as claims to moneys. Hence, unless the definition is to be useless, exclusions must be found." Surrey, *supra*.

statutory exclusions qualifies as a capital asset * * *." *C. I. R.* v. *Gillette Motor Transport, Inc.*, 364 U. S. 130, 134 (1960); *C. I. R.* v. *Phillips*, 275 F. 2d 33, 35 (4th Cir. 1960). Gains which result from the sale or exchange of capital assets receive preferential tax treatment. Therefore, "the definition of a capital asset must be narrowly applied," *Corn Products Refining Co.* v. *C. I. R.*, 350 U. S. 46, 52 (1955); *Mansfield Journal Co.* v. *C. I. R.*, 274 F. 2d 284, 286 (6th Cir. 1960), in order to effectuate the basic Congressional purpose "to relieve the taxpayer from * * * excessive tax burdens on gains resulting from a conversion of capital investments, and to remove the deterrent effect of those burdens on such conversions." *Burnet* v. *Harmel*, *supra*, at p. 106; *Corn Products Refining Co.* v. *C. I. R.*, *supra*. We do not believe that for income tax computation purposes the beneficiaries of the estate of a deceased entertainer receive by descent a capitalizable "property" in the name, reputation, right of publicity, right of privacy or "public image" of the deceased; or that in this case the petitioner, for tax purposes, owned any "property" which came into existence after Glenn Miller's death.[10] Therefore, income received by Mrs. Miller from contractual arrangements made by her with Universal dealing with deceased's intangible rights of the nature above specified is "ordinary" income as opposed to capital gains or loss under § 1221 of the Internal Revenue Code of 1954.

Affirmed.

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[10] Petitioner insists that in *Thomas D. Armour*, 22 T. C. 181 (1954) we have a "reasonably definite indication" (Pet. Br. p. 32) that the Tax Court would, under some circumstances, hold that a right of publicity is property which qualifies as a capital asset. In that case a living celebrity granted the use of his name to a golf ball manufacturer. The court did not discuss the issue of whether there was "property," but held that on the facts of that case there was no "sale." Petitioner regards this as an implied recognition of the "property right"; but we think, to the contrary, that the absence of a "sale" was used to avoid the very issue. Compare *Runyon, Jr.* v. *U. S.*, *supra*.

Appendix B

Judgment.

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of February, one thousand nine hundred and sixty-two.

Present: HON. STERRY R. WATERMAN,
HON. IRVING R. KAUFMAN,
HON. THURGOOD MARSHALL,
Circuit Judges.

HELEN D. MILLER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Appeals from The Tax Court of the United States.

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.